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In the Supreme Court of the United States

OCTOBER TERM, 1976

MARLIN REEVES, PETITIONER

v.

UNITED STATES OF AMERICA

JOHNNY ALLEN BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5)[1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1976. The petition for a writ of certiorari in No.

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[1]"Pet. App.," as used in this brief, refers to the appendix filed in No. 75-6834.

75-1802 was filed on June 11, 1976, and the petition in No. 75-6834 was filed on May 27, 1976. Both petitions are therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether testimony by a government informer is admissible without corroboration, and whether, in any event, such corroboration was present in this case.

2. Whether the prosecution withheld evidence of an agreement not to prosecute one of its witnesses.

3. Whether the trial court erred in limiting cross-examination about matters collateral to the offenses charged.

4. Whether the trial court properly admitted certain tape recordings in evidence.

5. Whether petitioner Reeves was denied his Sixth Amendment right to a speedy trial.

STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, each petitioner was convicted of conspiracy to violate the federal counterfeit laws, in violation of 18 U.S.C. 371, and of aiding and abetting the delivery of counterfeit bills, in violation of 18 U.S.C. 473 and 2. Petitioner Reeves was also convicted of passing counterfeit money, in violation of 18 U.S.C. 472. Petitioner Berry was sentenced to concurrent terms of two years' imprisonment on each count, and petitioner Reeves was sentenced to five years' imprisonment. The court of appeals affirmed the convictions except for the aiding and abetting conviction of petitioner Berry which it reversed (Pet. App. 1-5).

The evidence showed a conspiracy to sell counterfeit currency to federal agents posing as buyers.[2] In June 1972, one Henry Mizell met with petitioner Berry and his father, Cecil Berry, and agreed to help them find a buyer for $250,000 in counterfeit fifty and one hundred dollar bills (Tr. 286, 290-291). Later, while Mizell was under arrest on unrelated state charges, he told Secret Service Agent Stevenson that he knew of a source of counterfeit currency, and agreed to cooperate with the agent in arranging a purchase (A. 109-110).[3] Mizell and Stevenson, posing as a supplier of narcotics, then met with petitioner Berry, who expressed an interest in amphetamines and asked Stevenson if he would like to buy counterfeit fifty and one hundred dollar notes in return (A. 112). At that time petitioner Berry told Stevenson that he had previously passed counterfeit bills at service stations in two states (A. 87-88, 116-117), having received one of the bills from his father (A. 117).

After this meeting, Mizell and petitioner Berry informed Cecil Berry that they had found someone interested in buying the counterfeit money (A. 89). Stevenson then discussed the price of the counterfeit currency with Cecil Berry and received a sample note from co-conspirator Cox (A. 124-134). In the following weeks, Stevenson continued to negotiate the size and price of the purchase with Cox and Cecil Berry. During this period Cecil Berry and co-conspirator Cox both mentioned that petitioner Reeves had the money (A. 116; Tr. 316). In December 1972, Cox was arrested as he attempted to deliver the currency to Stevenson.

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[2]Charged with petitioners were Cecil Berry and Gilbert Cox. Cox was tried separately from the other defendants.

[3]"A." refers to the government's appendix in the court of appeals.

After Cox was arrested, Mizell visited Reeves at his trailer and they discussed the delivery in a conversation monitored by Stevenson and another agent (A. 98-100). Thereafter Cox, who had agreed to cooperate with the agents, placed a telephone call to Reeves, telling him that the delivery had been successful (A. 156). That call was also monitored by federal agents with Cox's consent (A. 56-57).

ARGUMENT

1. The evidence against petitioners was provided in part by the testimony of Henry Mizell. Petitioners variously assert[4] that Mizell was a government informer, a co-conspirator, and an accomplice (Pet. 1, 3, 5-6), and argue that a conviction should not be allowed to rest upon his "uncorroborated" testimony.

Neither petitioner presented this argument below, and the question thus was not preserved for consideration by this Court. *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330; *California* v. *Taylor*, 353 U.S. 553, 557, n. 2. In any event, "there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them," *Caminetti* v. *United States*, 242 U.S. 470, 495, and, similarly, no rule subjecting the testimony of an informer to a requirement of corroboration. *Morgan* v. *United States*, 319 F. 2d 711 (C.A. D.C.), certiorari denied, 375 U.S. 884.[5] Furthermore, Agent Stevenson

[4]Petitioner Reeves, without additional briefing, has adopted the arguments presented by petitioner Berry in No. 75-6834, "insofar as the same relate to him" (Reeves Pet. 2). Unless otherwise indicated, "Pet.," as used in this brief, will refer to the petition for a writ of certiorari in No. 75-6834.

[5]While Mizell's decision to cooperate with the government was surely an abandonment of the conspiracy, his precise role therefore is not material to the disposition in this case.

testified about the meeting with petitioner Berry at which petitioner Berry told him that he had a "source" of counterfeit notes and offered to sell him a large quantity (Tr. 467-468), and Stevenson and Agent John Talley testified about the monitored conversations with Reeves (Tr. 85-87, 125-127, 534-536). That evidence amply corroborated Mizell's testimony linking petitioners to the conspiracy.

2. Petitioners also contend (Pet. 6-9) that the prosecution failed to disclose an agreement not to prosecute Mizell. See *Giglio* v. *United States*, 405 U.S. 150. While petitioners cannot point to any specific agreement between the government and Mizell, they suggest that Mizell's interest in avoiding federal prosecution for his prior involvement in the counterfeiting scheme (as well as state prosecution on other charges) is "strong circumstantial evidence" of an undisclosed "tacit agreement."

Petitioners' reliance on *Giglio* v. *United States, supra*, is misplaced. In *Giglio* the prosecution had explicitly promised a key witness immunity from prosecution in exchange for his cooperation and that agreement had been withheld from the defense. By contrast, the court of appeals in this case found "absolutely no support in the record for the claim that there was such an agreement" (Pet. App. 2). While petitioners say that an agreement must be implied from circumstantial evidence, that evidence in any event was disclosed to the jury on both direct and cross-examination. The jury was fully aware that state charges were pending against Mizell and that he had not been indicted by the federal government despite his admitted role in prior activities involving both counterfeit currency and narcotics (*e.g.*, Tr. 295, 347-349, 384-385). While Mizell denied that "any promises * * * or any threats" had been made to induce his cooperation, he conceded that the federal agents had promised to inform the state authorities of his cooperation (Tr. 294). Thus, if this evidence were sufficient to show a

tacit agreement, which it was not, the jury was already completely aware of it.

3. Petitioners contend (Pet. 9-11) that the trial court restricted their right of cross-examination and denied them access to a witness who might have given exculpatory testimony. On direct examination Mizell testified (Tr. 291-292) that, prior to his contact with Agent Stevenson, he and the Berrys drove to Little Rock, Arkansas, to meet a prospective buyer of counterfeit currency. While Mizell talked with the person, the Berrys remained in the parking lot. On cross-examination, petitioners' counsel asked Mizell to identify the prospective buyer. The government objected and the trial court refused to order disclosure, noting that the area of inquiry was "very remote from the [instant] case" (Tr. 392).

This evidentiary ruling did not deprive petitioners of any constitutional right. A trial judge has broad discretion to control the scope of cross-examination (*Geders* v. *United States*, No. 74-5968, decided March 30, 1976, slip op. 6), particularly regarding matters deemed collateral to the issue at hand (*United States* v. *Kirk*, 496 F. 2d 947 (C.A. 8); *United States* v. *Brumbaugh*, 471 F. 2d 1128 (C.A. 6), certiorari denied, 412 U.S. 918). Here the attempts by Mizell and the Berrys to dispose of counterfeit currency prior to meeting Stevenson were essentially background to the events relied upon by the prosecution to prove the conspiracy. Thus, the court of appeals properly held that the trial judge acted within his discretion "[i]n view of the remoteness of [the Little Rock] transaction from the activities forming the basis of the charges against the [defendants]" (Pet. App. 3).

In addition, petitioners' claims of prejudice are ill-founded. To begin with, the defense acknowledged at trial that it had a "rough [idea]" of the person's identity (Tr. 388). Moreover, petitioner Berry's attorney had

represented Cox, a co-conspirator, at an earlier trial in which Mizell gave the same testimony (Tr. 388-390). Yet he filed no pretrial motion in this case but waited until his cross-examination of Mizell before requesting the desired information. The trial court was entirely justified in refusing to delay the proceedings at that time.

4. The prosecution introduced in evidence consensual tape recordings of conversations between petitioners' co-conspirators and Secret Service agents or Mizell, to which petitioner Berry was not a party. Without specifying particular recordings, petitioners contend (Pet. 12-13) that the recordings were introduced without "any procedural safeguards relating to when, where, how and under what conditions" they were made.

Petitioner Berry does not have standing to raise these claims. *Alderman* v. *United States*, 394 U.S. 165. In any event, the record refutes the contention. The agents testified at length concerning the manner in which the recordings were made and maintained (A. 35-38, 41-49, 86-87, 93-107), and the trial court ruled that a proper foundation of authenticity and reliability had been laid for their admission (Tr. 111-112). Petitioners' suggestion (Pet. 13) that the recordings were made and introduced "selectively," possibly with a view to suppressing exculpatory evidence, is insubstantial. The agents were fully cross-examined regarding the reasons why some but not all meetings were recorded and indicated that they were troubled by malfunctioning equipment (*e.g.*, Tr. 100 ff., 557 ff.). In addition, the recordings were simply cumulative of direct testimony by Mizell and the agents about their conversations with the conspirators.

5. Petitioner Reeves contends (Reeves Pet. 6-8) that he was denied his Sixth Amendment right to a speedy trial by a thirteen and one-half month delay between

indictment and trial. However, the court of appeals, in an opinion upon which we rely, correctly applied the balancing test of *Barker* v. *Wingo*, 407 U.S. 514, 530, and determined that petitioner's Sixth Amendment rights were not violated. The court acknowledged that the length of the delay was sufficient to require further inquiry (Pet. App. 3) and that petitioner had asserted his right to a speedy trial (Pet. App. 4). It found, however, that the government had a legitimate reason to delay the trial of petitioner and two co-defendants until completion of the trial of a third co-defendant who had confessed[6] and that a crowded docket, the need to dispose of numerous defense motions, and the illness of a co-defendant who was to be tried with petitioner also contributed to the delay (*ibid.*).

Since the delay was thus attributable to "neutral" factors (*ibid.*), the court turned to the question of prejudice and concluded that petitioner had made an insufficient showing on that question. After noting that petitioner was incarcerated for a few days at most, the court ruled that his primary claim—that the death of two character witnesses impaired his defense—was insubstantial since he was not deprived of any substantive evidence and he was in any event able to call other character witnesses (Pet. App. 4-5).[7]

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[6]The court noted that the severed defendant alone did not file a speedy trial motion. The court thus concluded that "[t]he apparent strategy of the defense was to avoid having [the severed defendant] tried first and the government was entitled to counter this strategy" (Pet. App. 4).

[7]Petitioner Reeves also made allegations of embarrassment and injury to his business. The court properly ruled that these "general" allegations did not constitute sufficient prejudice to justify dismissal of the charges.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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